



38 CFR Part 38

RIN 2900-AR03

Referral for VA Administrative Decision for Character of Discharge

Determinations

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations to clarify that, when determining eligibility for interment or memorialization benefits, the National Cemetery Administration (NCA) will refer cases involving other than honorable (OTH) discharges, certain other discharges, or potential statutory or regulatory bars to benefits, to the Veterans Benefits Administration (VBA) for character of discharge determinations. VA is merely updating its regulations to conform with statute and current practice.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jerry Sowders, Division Chief, Eligibility Verification Division, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Telephone: 314-416-6369. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 18, 2020, VA published in the Federal Register (85 FR 82399) a proposed rule revising its regulations to clarify that, when determining eligibility for interment or memorialization benefits, NCA will refer cases involving OTH discharges or other character of discharge issues to VBA for an administrative decision. The public comment period ended on February 16, 2021.

VA received one comment that expressed disagreement with the proposed rule, stating that the referral of cases for a character of discharge determination was “morally and ethically reprehensible.” The commenter also asserted that the proposed rule sought to assume Congress’s role “to write statute” by redefining the term “veteran,” and suggested that VA use an automated formula to evaluate whether an individual satisfies the statutory definition of veteran. We thank the commenter for this comment.

However, we disagree that this rule redefines the term “veteran” in any way. While the supplemental information in the proposed rule explained that eligibility for NCA-administered benefits is tied to an individual establishing “veteran” status or meeting other specified conditions, this rule does not affect the statutory definition of “veteran” as provided by Congress in 38 U.S.C. 101(2). The rule only amends 38 CFR 38.620 by adding a note following paragraph (i) to inform that a benefit request, pertaining to a decedent whose character of discharge may potentially bar eligibility to that benefit, may be referred to VBA for review in accordance with 38 CFR 3.12 (Character of discharge) or other applicable sections. As such, we make no changes based on the comment.

We appreciate the commenter’s suggested alternative approach to determining whether an individual satisfies the statutory definition of “veteran”, but Congress has delegated to VA the authority to promulgate reasonable regulations on VA benefits eligibility, which it has done in 38 CFR 3.12. See *Garvey v. Wilkie*, 972 F.3d 1333 (Fed. Cir. 2020). It is not 38 CFR 38.620 or this rule (which merely clarifies NCA current practice), but 38 CFR 3.12, that seems to pertain more to the commenter’s concern.

Under 38 CFR 3.12(a), some discharges, such as honorable and general (under honorable conditions) automatically convey “veteran” status. However, other types of discharges require in-depth examination under the provisions of 38 CFR 3.12(d) to determine whether the discharge should be considered to have been issued under

dishonorable conditions. Moreover, the provisions of 38 CFR 3.12(c), commonly referred to as the statutory bars to benefits (since they are derived from 38 U.S.C. 5303(a)) may also be implicated. Because of VBA's expertise and familiarity with 38 CFR 3.12, NCA has historically referred character of discharge issues to VBA. Doing so helps ensure VA-wide consistency on benefits determinations and helps prevent confusion in claimants and beneficiaries that would likely result from VBA and NCA having differing standards. The amendment this final rule makes merely adds an explanatory note to inform the public of this long standing process. As such, we make no changes based on the comment regarding the complexity of character of discharge determinations, or the commentor's suggestion that VA utilize automated formulas to determine the character of a discharge.

Finally, the commenter indicated that the proposed rule was not available for comment for the entire 60 days following publication in the Federal Register, and requested an extended period for comment. We note that the proposed rule was published in the Federal Register on December 18, 2020, and the comment period closed on February 16, 2021, which is a period of 60 days. Consequently, we take no action based on this comment.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and

Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The provisions associated with this rulemaking are merely internal administrative processes to VA specifically and do not involve or impact any external entities outside of VA. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.201, National Cemeteries; and 64.202, Procurement of Headstones and Markers and/or Presidential Memorial Certificates.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR part 38

Administrative practice and procedure, Cemeteries, Claims, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 14, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts

Regulation Development Coordinator

Office of Regulation Policy & Management

Office of General Counsel

Department of Veterans Affairs

For the reasons set forth in the preamble, VA amends 38 CFR part 38 as set forth below:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 continues to read as follows:

AUTHORITY: 38 U.S.C. 101, 107, 112, 501, 512, 2306, 2402, 2403, 2404, 2407, 2408, 2411, 5303, 7105.

2. Amend § 38.620 by adding a note to the section to read as follows:

§ 38.620 Persons eligible for burial.

Note 1 to § 38.620: A benefit request pertaining to a decedent whose character of discharge may potentially bar eligibility to that benefit may be referred to the Veterans Benefits Administration for review in accordance with 38 CFR 3.12 (Character of discharge) or other applicable sections.